

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARTIN R. BUB,

Plaintiff,

v.

TIM FULLER, ELLEN RAY, TIM HAINES,
CHARLES FACKTOR and ED WALL,

Defendants.

OPINION AND ORDER

13-cv-770-bbc

Plaintiff Martin Bub, a prisoner at the Wisconsin Secure Program Facility, located in Boscobel, Wisconsin, has submitted a proposed complaint, a motion for leave to amend his complaint and an amended complaint. In his amended complaint, he alleges that prison officials have violated his constitutional rights by taking money he had earmarked to make restitution in a Milwaukee County criminal case and diverting the funds to pay off debt plaintiff has accumulated in other cases.

Plaintiff has paid the \$400 filing fee for this case. Because plaintiff may amend his complaint at this point in the proceedings once without leave from the court, I will deny his motion for leave to amend as unnecessary. I will consider his amended complaint, dkt. #4, as the operative pleading in this case.

The next step is to screen the amended complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. McGowan v. Hulick, 612 F.3d 636, 640 (7th Cir. 2010).

After considering plaintiff's allegations, I will allow him to proceed on due process claims against defendants, but deny him leave to proceed on his Fourth Amendment or equal protection claims.

Plaintiff alleges the following facts in his complaint.

ALLEGATIONS OF FACT

Plaintiff Martin Bub is a prisoner currently housed at the Wisconsin Secure Program Facility. In May 2000, the Circuit Court for Milwaukee County issued an order directing plaintiff to make restitution of \$952, to be deducted at a rate of 25 percent of his prison wages. Also under the terms of this order, at some point plaintiff will be required to serve one day of confinement for every \$50 he fails to repay. Plaintiff believes that from December 2000 to October 2009, about \$340 was deducted from his wages under the terms of this order.

In November 2009, while plaintiff was housed at the Green Bay Correctional Institution, he decided to pay off the remaining amount of the restitution. He contacted the business office of the Green Bay prison, which instructed him how to pay off the remaining balance of \$610.67. Plaintiff filled out "the proper paperwork" and submitted it to the business office. The business office deducted the amount from his trust fund account and provided plaintiff a receipt showing that the funds had been deducted and that his restitution was paid in full.

In August 2012, plaintiff contacted the circuit court and asked for an amended judgment of conviction correcting an error in the judgment (the judge had ordered \$925 in restitution, but \$952 was entered on the order). The court sent plaintiff an amended judgment showing that the amount of restitution had been lowered to \$925. This led plaintiff to believe that he had overpaid the amount owed by \$27.

In September 2012, plaintiff (who was now housed at the Wisconsin Secure Program Facility) contacted the prison business office to request reimbursement of the \$27 he overpaid. The business office asked to see the amended judgment and then replied stating that plaintiff was correct and that staff would look into the issue.

In October 2012, the business office told plaintiff that “money had been applied to other obligations.” Plaintiff responded, stating that he had no other obligations. His trust fund account information reflects this fact. The business office told plaintiff that if he disputed the way the money was distributed, he should write the Department of Corrections Cashiers Unit in Madison.

In January 2013, plaintiff wrote to the Cashiers Unit, requesting an explanation of how the \$27 overpayment was applied. In March 2013, defendant Tim Fuller, the supervisor for the Cashiers Unit, responded to plaintiff’s letter, stating that *none* of the money plaintiff had paid toward his Milwaukee County case had been applied to that case. Rather, all of the funds were allocated toward judgments in three other cases. Plaintiff wrote to staff in the business office, who told him that staff was told “by both the cashiers unit & legal counsel that [plaintiff’s] funds may be applied to other cases in accordance w/ Admin

Code & policy.” Later, business office staff told plaintiff that he was correct that his funds could not be diverted to other cases.

Plaintiff filed an inmate grievance about the misallocation of his funds. Defendant institution complaint examiner Ellen Ray recommended dismissal of the complaint, stating that she could not “investigate the actions of the court” and that plaintiff should contact the court and the Cashiers Unit. Defendants Tim Haines (the warden), Charles Facktor (a corrections complaint examiner) and Ed Wall (the Department of Corrections secretary) all upheld this decision.

OPINION

Plaintiff is bringing claims against defendant Fuller for misallocating his funds and against defendants Ray, Haines, Facktor and Wall for doing nothing to fix the problem after being alerted to it. Plaintiff frames his claims as arising under the Fourth Amendment’s protection against unreasonable seizures and the Fourteenth Amendment’s protections against taking his property without due process or in violation of the equal protection of the law. I address each theory in turn.

A. Fourth Amendment

It is difficult to understand how a Fourth Amendment claim could arise from these facts. Certainly prison officials had plaintiff’s funds in their possession when they misallocated it, in dereliction of plaintiff’s intentions, but they already had his funds in their

possession *before* the misallocation; the funds were sitting in a prisoner trust fund account to which prison business members have access. Because I am aware of no case law suggesting that the misallocation of a prisoner's money violates the Fourth Amendment, I will deny plaintiff leave to proceed on such claims.

B. Due Process

A procedural due process violation occurs under the Fourteenth Amendment when a state actor deprives an individual of a constitutionally protected interest in “life, liberty, or property” without providing adequate process. Therefore, a due process analysis involves a two-step inquiry: (1) whether the defendants deprived the plaintiff of a constitutionally protected liberty or property interest; and (2) if so, whether that deprivation occurred without due process of law. *Doe v. Heck*, 327 F.3d 492, 526 (7th Cir. 2003) (citing *Zinerman v. Burch*, 494 U.S. 113, 125 (1990); *Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 616 (7th Cir. 2002)). Plaintiff has a constitutionally protected property interest in the funds deposited in his prison trust account. *Campbell v. Miller*, 787 F.2d 217, 222 (7th Cir. 1986). The court of appeals has suggested that a property interest may be implicated in the *use* of funds in a prison account, *Kimberlin v. United States Dep't of Justice*, 788 F.2d 434, 438 (7th Cir. 1986) (“The only cognizable property interest at stake here is the loss of the money or use of the money in [prisoner's] commissary account.”).

The court of appeals has made it clear that a prisoner's property interest in disbursing money in particular ways is severely curtailed because when a warden has discretion to allow

or deny most types of disbursements. Booker El v. Superintendent, Indiana State Prison, 668 F.3d 896, 900 (7th Cir. 2012) (“A protected property interest exists only when the state’s discretion is clearly limited”); see also Gillis v. Meisner, 525 F. App’x 506, 509 (7th Cir. 2013) (Wisconsin prisoner did not have property right to send more than \$25 to family because prison policies gave warden discretion to approve disbursements in excess of \$25). However, I understand plaintiff’s claims to be something different—that prison officials initially allowed him to disburse more than \$900 in payments intended for restitution in one criminal case, but then redirected that money toward other cases without plaintiff’s approval. Considering the ill-defined scope of a prisoner’s property interest in the use of his funds, I will assume for purposes of this order that he has a property interest in the proper disbursement of his funds.

Nonetheless, whether plaintiff states a due process claim depends in part on whether plaintiff is saying that his funds were misallocated pursuant to prison policy or in violation of that policy. Plaintiff’s complaint is difficult to understand on this issue; he suggests both that his funds were disbursed to the wrong cases pursuant to prison policy and that prison staff told him that the diversion of the funds was against policy.

To the extent that plaintiff is saying that the loss of use of his property was the result of “random and unauthorized acts” rather than acts carried out pursuant to a policy of the institution or the Department of Corrections, he cannot maintain a due process claim. In this situation, a plaintiff is not entitled to procedure before his property is taken, so long as a meaningful post deprivation remedy exists. Hudson v. Palmer, 468 U.S. 517, 534-35

(1984) (no due process claim for random and unauthorized deprivation of property, even if taking is intentional, so long as state provides inmate suitable post deprivation remedy). The state of Wisconsin provides several post deprivation procedures for challenging the alleged wrongful taking of property. In particular, Wis. Stat. ch. 893 contains provisions concerning tort actions to recover damages for wrongfully taken property.

Construing plaintiff's complaint generously, I will assume that he is saying that his property was disbursed against his wishes as part of a prison policy. When an established state procedure deprives one of property, post deprivation remedies generally fail to satisfy due process. Zinermon, 494 U.S. at 132 ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking."). Although questions remain regarding the nature of plaintiff's property interest in the use of his funds as well as the scope of the prison policies regarding disbursement of prisoner funds, at this point I conclude that he may proceed on due process claims against defendant Fuller, the supervisor for the Cashiers Unit, who was aware that the funds were misallocated. He may also proceed on claims against defendants Ray, Haines, Facktor and Wall, all of whom considered plaintiff's grievances about the misallocation but did nothing to fix the problem.

C. Equal Protection

Finally, plaintiff attempts to bring an equal protection claim. Generally, to state an equal protection claim, a plaintiff must allege that the department enacted policies

intentionally to treat a class of prisoners less favorably than other similarly situated prisoners without having a rational reason for the differential treatment. Engquist v. Oregon Department of Agriculture, 553 U.S. 591, 603 (2008). In this case, plaintiff does not allege that he is a member of a class that received less favorable treatment. Rather, plaintiff seems to be saying that he was singled out arbitrarily for discriminatory treatment; thus is it possible he means to bring a “class-of-one” equal protection claim. Although the Court of Appeals for the Seventh Circuit has not decided the precise elements of a class-of-one claim, Del Marcelle v. Brown County Corp., 680 F.3d 887 (7th Cir. 2012) (en banc), at the least, a plaintiff must show “that he was intentionally treated differently from other similarly situated individuals and that there was no rational basis for this difference in treatment.” Thayer v. Chiczewski, 697 F.3d 514, 531-32 (7th Cir. 2012).

In the present case, plaintiff states that defendant Fuller “is not collecting from other individual inmates who have civil judgments against them” This allegation is not enough to support a class-of-one claim. It is not the “collection” of funds that is the problem in this case—after all, plaintiff *wanted* the unit to collect his funds and apply them toward his Milwaukee County case—but rather the diversion of the collected funds for purposes unapproved by plaintiff. Plaintiff does not suggest that there are any similarly situated inmates who were able to send funds where they wanted. Therefore I conclude that he may not proceed on an equal protection claim.

ORDER

IT IS ORDERED that

1. Plaintiff Martin Bub's motion for leave to amend his complaint, dkt. #3, is DENIED as unnecessary.

2. Plaintiff is GRANTED leave to proceed on due process claims against defendants Tim Fuller, Ellen Ray, Tim Haines, Charles Facktor and Ed Wall.

3. Plaintiff is DENIED leave to proceed on his unreasonable seizure and equal protection claims.

4. Under an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's amended complaint and this order are being sent today to the Attorney General for service on the state defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service on behalf of the state defendants.

5. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff has learned what lawyer or lawyers will be representing defendants, he should serve the lawyers directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

6. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

Entered this 30th day of January, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge